80-1815

No. 81-

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK CASTRO, JR.,
Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MR. JOHN T. PIERCE, JR.
PAUL L. PRATT, P.C.
Route 111 at Airline Drive
P. O. Box 179
East Alton, Illinois 62024
(618) 259-8011
Attorneys for Petitioner

MR. WAYNE L. HANOLD
WESTERVELT, JOHNSON, NICOLL
& KELLER
1400 First National Bank Building
Peoria, Illinois 61602
(309) 671-3550
Attorneys for Respondent

ORAL ARGUMENT REQUESTED

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED FOR REVIEW

1) In a Federal Employers' Liability Act case, 45 U.S.C., §51, *et seq.*, was Petitioner's counter-affidavit, in reference to executing certain releases, sufficient to raise questions of fact so as to necessitate a trial by jury on those issues rather than being subjected to a judgment on the pleadings.

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No. 81-

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FRANK CASTRO, JR.,
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CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

INTRODUCTORY STATEMENT

Petitioner, Frank Castro, Jr., petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois is appended hereto at pages A-30 to A-35. The Order of the Supreme Court of Illinois denying Petitioner's Petition for Rehearing dated January 29, 1981, is appended hereto at page A-36.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on December 1, 1980. Petitioner's timely Petition for Rehearing in the Supreme Court of Illinois was denied by the Supreme

Court of Illinois on January 29, 1981, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3), 45 U.S.C., §51 *et seq.* and Rule 17.1(b) of the Rules of the United States Supreme Court.

STATUTES INVOLVED

45 U.S.C., §51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employees, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed as such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

ILLINOIS REVISED STATUTE, CH. 110, §48

(1) Defendant may, within the time for pleadings, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the fact of the pleading attacked the motion shall be supported by affidavit:

(f) That the claim or demand set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(2) A similar motion may be made by any other party against whom a claim or demand is asserted.

(3) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one at law and a jury demand has been filed by the opposite party in apt time.

(4) The raising of any of the foregoing matters by motion under this section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer.

(5) Pleading over after denial by the court of a motion under this section is not a waiver of any error in the decision denying the motion.

(6) The form and contents of and procedure relating to affidavits under this section shall be as provided by rule.

STATEMENT OF THE CASE

On or about February 2, 1977, petitioner filed his Complaint in the Circuit Court, Tenth Judicial Circuit, Peoria County, Illinois. Said Complaint was filed pursuant to the Federal Employers' Liability Act, 45 U.S.C., §51 *et seq.*, hereinafter referred to as the F.E.L.A. Said Complaint sounded in three counts for three separate accidents, namely, Count I for an accident that occurred on or about February 20, 1974, Count II for an accident that occurred on or about September 26, 1974, and Count III for an accident that occurred on or about June 20, 1975. A copy of the Complaint is appended hereto as Appendix A, pp. A-1—A-7.

Respondent railroad filed a Motion to Dismiss Counts I and II of plaintiff-petitioner's Complaint pursuant to Illinois Revised Statutes, Ch. 110, §48, together with affidavits raising the issue of petitioner having released the causes of action alleged in Counts I and II of the Complaint. A copy of the motion, together with affidavits, are appended hereto as Appendix B, pp. A-8—A-21.

Petitioner filed a counter-affidavit so as to raise questions of fact regarding the releases, that is, lack of consideration and mutual mistake of fact and/or fraud, and to have these questions of fact submitted to a jury for its determination. A copy of petitioner's affidavit is appended hereto as Appendix C, pp. A-22—A-23.

The Trial Court dismissed plaintiff-petitioner's Complaint on the basis of the releases and that the counter-affidavit did not raise questions of fact to be determined by a jury.

The Appellate Court for the Third District of Illinois reversed the Trial Court stating that petitioner's counter-affidavit pertaining to the releases raised questions of fact for the jury to determine. (Appendix D, pp. A-24—A-29).

The Supreme Court of Illinois reversed the Appellate Court stating that petitioner's counter-affidavit was insufficient to raise questions of fact for the jury to determine in regard to the validity of the releases. (Appendix E, pp.A-30—A-35).

HOW FEDERAL QUESTIONS WERE PRESENTED

Petitioner asserted his interrelated Federal claims at every level of the Illinois Court system. Plaintiff's Complaint was filed pursuant to a Federal Statute, 45 U.S.C., §51 *et seq*. The Trial Court was presented with the appropriate law in oral argument against respondent's Motion to Dismiss. The Appellate Court and Supreme Court of Illinois were presented with the appropriate law in briefs as can be seen from their opinions. Appellate Court Opinion pp. A-24—A-29. Supreme Court Opinion pp. A-30—A-35.

REASONS FOR GRANTING THE WRIT

The validity of a release in an F.E.L.A. case is governed by the Federal Law. *Dice* v. *Akron C. & Y. R. Co.* (1952), 342 U.S. 359, 361, 72 S.Ct. 312; *Maynard* v. *Durham and Southern Railway Company* (1961), 365 U.S. 160, 80 S.Ct. 561.

A Federal right cannot be defeated by forms of local practice. *Brown* v. *Western Railway of Alabama* (1949), 338 U.S. 294, 70 S.Ct. 105.

Pursuant to the Federal law, a release in an F.E.L.A. case may be attacked on three grounds, namely, fraud, lack of consideration and mutual mistake of fact. *Maynard* v. *Durham & Southern Ry. Co.* (1961), 365 U.S. 160, 81 S.Ct. 561; *Dice* v. *Akron C. & Y. R. Co.* (1951), 342 U.S. 359, 72 S.Ct. 312

Petitioner states in his counter-affidavit that when he executed the releases, it was solely for the purpose of receiving back wages. This is sufficient to present a jury question of lack of consideration. *Maynard* v. *Durham and Southern Railway Co.* (1961), 365 U.S. 160, 80 S.Ct. 561; *Fournier* v. *Canadian Pacific Railroad* (2nd Cir. 1975), 512 F.2d 317.

Petitioner states in his counter-affidavit that he had no knowledge that he had a physical condition which would eventually require an operation. Plaintiff's back was operated upon subsequent to executing the releases. This is sufficient to present a jury question of mutual mistake of fact if the railroad also did not know of plaintiff's real condition, or fraud if the railroad knew and the plaintiff didn't know of his real condition. *Taylor* v. *Chesapeake & Ohio Railway Co.* (4th Cir. 1975), 518 F.2d 536; *Wooten* v. *Skibs A/S Samuel Bakke* (4th Cir. 1969), 431 F.2d 821; *Graham* v. *Atchison, T & S.F. Ry. Co.* (9th Cir. 1949), 1976 F.2d 819.

CONCLUSION

Since there were issues raised by petitioner's counter-affidavit as to the validity of the releases, which issues should have been decided by a jury, the Supreme Court of Illinois erred and this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

John T. Pierce, Jr.
Paul L. Pratt, P.C.
Route 111 at Airline Drive
P. O. Box 179
East Alton, IL 62024
Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY, ILLINOIS

No. 77L397
F.E.L.A.

Frank Castro, Jr.,
Plaintiff,

vs.

Chicago, Rock Island and Pacific Railroad Company,
a corporation,
Defendant.

COMPLAINT

Now comes the plaintiff, FRANK CASTRO, JR., by and through his attorneys, PRATT, PIERCE & BRADFORD, LTD., and GARY L. CLARK, and for his cause of action against the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, alleges as follows:

Count I

1. That on or about February 20, 1974, and for some time prior thereto, the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, was engaged in the business of interstate commerce in and throughout the several states of the United States as a common carrier by railroad; and for the purpose thereof did operate and do business in and about Peoria County, in the State of Illinois.

2. That at the said time and prior thereto, plaintiff was employed by the defendant as a track laborer and was engaged in the performance of his duties as such worker on the aforesaid date when plaintiff was injured as hereinafter alleged.

3. That at said time and prior thereto, defendant was engaged in interstate commerce as a common carrier by railroad, and all or part of plaintiff's duties as an employee of the defendant were in furtherance of interstate commerce and closely, directly and substantially affected the same, by reason whereof the rights and liabilities of the parties were governed by the Act of Congress known as the Federal Employers' Liability Act, 45 U.S. Code, Section 51-60.

4. That on or about the aforesaid date while plaintiff was engaged in the operation of a motor car, said car derailed and plaintiff sustained severe and permanent injury as hereinafter alleged.

5. The defendant, by and through its duly authorized agents and employees, was then and there guilty of one or more of the following negligent acts or omissions in violation of the Federal Employers' Liability Act:

(a) Failed to see that the motor car being operated by plaintiff had not cleared the track switch and aligned said switch against said motor car;

(b) Used equipment in the control tower which did not indicate when a motor car had moved through a track switch;

(c) Failed to maintain adequate brakes on the aforesaid motor car;

(d) Failed to provide plaintiff with reasonably safe equipment and machinery to work with;

(e) Failed to provide plaintiff with a reasonably safe place to work.

6. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, plaintiff sustained severe and permanent injuries to his back, shoulder and left knee, resulting in disability and disfigurement and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injury; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; All To The Damage of the plaintiff in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).

WHEREFORE, plaintiff prays judgment against the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, in the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00) and for his costs of suit.

PRATT, PIERCE & BRADFORD, LTD.

by: /s/ Glenn E. Bradford
Route 111 at Airline Drive
East Alton, Illinois 62024
Telephone: 618-259-8011

Gary L. Clark
1810 Savings Center Tower
Peoria, Illinois 61602
Telephone: 309-674-2164

Attorneys for Plaintiff.

NOTE: PLAINTIFF DEMANDS TRIAL BY JURY OF THIS CAUSE.

Count II

1. That on or about September 26, 1974, and for some time prior thereto, the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, was engaged in the business of interstate commerce in and throughout the several states of the United States as a common carrier by railroad, and for the purpose thereof did operate and do business in and about Peoria County, in the State of Illinois.

2. - 3. Plaintiff repeats and realleges paragraphs 2 and 3 of Count I hereof, as and for paragraphs 2 and 3 of this Count II.

4. That on or about the aforesaid date, while plaintiff was engaged in riding upon a track saw, said track saw derailed whereby plaintiff sustained severe and permanent injuries as hereinafter alleged.

5. That defendant by and through its duly authorized agents and employees was then and there guilty of one or more of the following negligent acts or omissions in violation of the Federal Employers' Liability Act:

(a) Failed to maintain its trackage in a reasonably safe condition;

(b) Failed to provide company trucks for the transportation of plaintiff and his crew on this job;

(c) Failed to provide plaintiff with a reasonably safe place to work.

6. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, plaintiff sustained severe and permanent injuries to his back, shoulder and left knee, resulting in disability and disfigurement and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injury; and he has been

and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; All To The Damage of the plaintiff in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00).

WHEREFORE, plaintiff prays judgment against the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, in the sume of TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00), and his costs of suit.

PRATT, PIERCE & BRADFORD, LTD.

by: /s/ Glenn E. Bradford
Route 111 at Airline Drive
East Alton, Illinois 62024
Telephone: 618-259-8011

Gary L. Clark
1810 Savings Center Tower
Peoria, Illinois 61602
Telephone: 309-674-2164

NOTE: PLAINTIFF DEMANDS TRIAL BY JURY OF THIS CAUSE

Count III

1. That on or about June 20, 1975, and for some time prior thereto, the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, was engaged in the business of interstate commerce in and throughout the several states of the United States as a common carrier by railroad, and for the purpose thereof did operate and do business in and about Peoria County, in the State of Illinois.

2. - 3. Plaintiff repeats and realleges paragraphs 2 and 3 of Count I hereof, as and for paragraphs 2 and 3 of this Count III.

4. That on or about the aforesaid date, while plaintiff was engaged in the removal of a frog, he sustained severe and permanent injury as hereinafter alleged.

5. The defendant, by and through its duly authorized agents and employees, was then and there guilty of one or more of the following negligent acts or omissions in violation of the Federal Employers' Liability Act:

(a) Failed to provide plaintiff with a crane or other machinery to facilitate the removal of the aforesaid frog;

(b) Failed to provide plaintiff with a reasonably safe place to work.

6. That as a result, in whole or in part, of one or more of the foregoing negligent acts or omissions, plaintiff sustained severe and permanent injuries to his back, shoulder and left knee, resulting in disability and disfigurement and which has caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injury; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby; All To The Damage of the plaintiff in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, in the sum of TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00), and his costs of suit.

PRATT, PIERCE & BRADFORD, LTD.

by: /s/ Glenn E. Bradford
Route 111 at Airline Drive
East Alton, Illinois 62024
Telephone: 618-259-8011

Gary L. Clark
1810 Savings Center Tower
Peoria, Illinois 61602
Telephone: 309-674-2164

NOTE: PLAINTIFF DEMANDS TRIAL
BY JURY OF THIS CAUSE.

APPENDIX B

IN THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

AT LAW NO. 77 L 397

Frank Castro, Jr.,
Plaintiff,

vs.

Chicago, Rock Island and Pacific Railroad Company,
a Corporation,
Defendant.

MOTION TO DISMISS COUNT I AND COUNT II OF PLAINTIFF'S COMPLAINT

NOW COMES the Defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, by its attorneys, WESTERVELT, JOHNSON, NICOLL & KELLER, pursuant to Illinois Revised Statutes, Chapter 110, Section 48(f), and requests the Court to dismiss Count I and Count II of Plaintiff's Complaint filed herein, and in support thereof states:

Count I

1. That the alleged accident of February 20, 1974, was released by the payment of $1,240.00 (attached hereto and made a part hereof as Exhibit A).

2. That a Release of All Claims was executed by Frank Castro, Jr., the Plaintiff, on June 17, 1974 (attached hereto and made a part hereof as Exhibit B).

WHEREFORE, the Defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, prays that the Court dismiss Count I of the Plaintiff's Complaint.

Count II

1. That the alleged accident of September 26, 1974, was released by the payment of $6,700.00 (attached hereto and made a part hereof as Exhibit C).

2. That a Release of All Claims was executed by Frank Castro, Jr., the Plaintiff, on May 20, 1975 (attached hereto and made a part hereof as Exhibit D).

WHEREFORE, the Defendant, CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, prays that the Court dismiss Count II of the Plaintiff's Complaint.

CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY,
Defendant

WESTERVELT, JOHNSON, NICOLL
& KELLER

BY: Wayne L. Hanold
Its Attorneys

WESTERVELT, JOHNSON, NICOLL & KELLER
1400 First National Bank Building
Peoria, Illinois 61602
Telephone: (309) 676-0801

EXHIBIT B

Chicago, Rock Island and Pacific Railroad Company

File No. 74-323 Castro Illinois Division

RELEASE OF ALL CLAIMS

For the sole and only consideration of one thousand two hundred forty and no/100 Dollars ($1,240.00), the receipt of which is hereby acknowledged, I hereby release and forever discharge Chicago, Rock Island and Pacific Railroad Company and all other persons, firms and corporations from any and all liability on account of any and all injuries (both known and unknown), damage to property, and all other loss or damage sustained by me at or near Chicago, Illinois on or about- - 19 - -, Wherein during all my employment with Rock Island to date.

THIS SPACE TO BE FILLED OUT IN EMPLOYEE SETTLEMENTS ONLY

The following apportionment is agreed upon:

To Time Lost $None

To Other Factors $_____

Tax $_____

Deduction for Sickness

Benefits Paid $None

Draft Amount $1,200.00

Period Covered .....SSA No. 338-16-5483

I know that $1,200.00 is all I will receive for all my claims, no other representations or promises having been made, and that said sum is paid solely in compromise of said claims, liability for which is denied. I have read and understand this release. Yes I have read and understand this release.

Signed and Sealed this 17th day of June 1974
Frank Castro Jr. (Seal)
(Seal)

Witnesses to Signature:
Kent A. Brown

Paid by draft No. 257209 drawn by Kent A. Brown, Adjuster, Chicago

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EXHIBIT D

Chicago, Rock Island And Pacific Railroad Company

File No. 74-1984 Illinois Division

RELEASE OF ALL CLAIMS

For the sole and only consideration of Six Thousand Seven Hundred and no/one hundredths Dollars ($6,700.00**), the receipt of which is hereby acknowledged, I hereby release and forever discharge Chicago, Rock Island and Pacific Railroad Company and all other persons, firms and corporations from any and all liability on account of any and all injuries (both known and unknown), damage to property, and all other loss or damage sustained by me at or near _____ on or about _____ 19 ____, during all my employment with the Chicago, Rock Island and Pacific Railroad Company to date.

THIS SPACE TO BE FILLED OUT IN EMPLOYEE SETTLEMENTS ONLY

The following apportionment is agreed upon:

Advancements—$1,300.00

To Time Lost $_____

To Other Factors $6,700.00**

Tax $_____

Deduction for Sickness

RRB Benefits Paid $546.10**

Draft Amount $4,580.90**

Period Covered .....SSA No.

Benefit Trust Life supplemental benefits paid $273.00

I know that $6,700.00** is all I will receive for all my claims, no other representations or promises having been made, and that said sum is paid solely in compromise of said claims, liability for which is denied.

Signed and Sealed this 20th day of May 1975

Frank Castro Jr. (Seal)

(Seal)

Witnesses to Signature:
P. J. Lloyd

Paid by draft No. 258306 drawn by L. G. Algozino

EXHIBIT E

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL OF ILLINOIS

PEORIA COUNTY

At Law No. 77 L 397

Frank Castro, Jr.,
Plaintiff,

vs.

Chicago, Rock Island And
Pacific Railroad Company,
a corporation,
Defendant.

AFFIDAVIT

STATE OF ILLINOIS }
} ss:
COUNTY OF COOK }

I, KENT A. BROWN, having been duly sworn and being of legal age, depose and state upon my oath that if called as a witness in the above-entitled cause, I could competently testify to the following matters of my own personal knowledge:

1. On and before June 17, 1974, I was employed by the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY as a claims adjuster.

2. On and before June 17, 1974, I was personally acquainted with FRANK CASTRO, JR., who is the Plaintiff in this case.

3. On and before June 17, 1974, FRANK CASTRO, JR., was employed by the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

4. On and before June 17, 1974, said FRANK CASTRO, JR., alleged to have suffered physical injuries as a result of one or more accidents occurring prior to June 17, 1974, during the course of his employment by the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and said FRANK CASTRO, JR., specifically alleged to have suffered injury from a work accident occurring on or about February 20, 1974.

5. On and immediately prior to June 17, 1974, FRANK CASTRO, JR., was actively working and performing manual labor in the course of his employment with the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

6. On June 17, 1974, a conference was held in my business office between myself and FRANK CASTRO, JR., at which time and place FRANK CASTRO, JR., agreed to execute a Release of All Claims in favor of the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY for all injuries which he may have sustained at any time prior to June 17, 1974, in consideration of the payment to FRANK CASTRO, JR., of the sum of One Thousand Two Hundred Forty Dollars ($1,240.00).

7. On June 17, 1974, FRANK CASTRO, JR., was of legal age.

8. On June 17, 1974, in my immediate presence, FRANK CASTRO, JR., signed a document entitled Release of All Claims. The document attached hereto as Exhibit "A" is a true, accurate and complete copy of said Release of All Claims signed by FRANK CASTRO, JR., in my presence on June 17, 1974.

9. The signature on Exhibit "A" attached hereto purporting to be that of FRANK CASTRO, JR., was affixed thereto by the person personally known to me to be FRANK CASTRO, JR., in my presence on June 17, 1974.

10. The signature on Exhibit "A" attached hereto purporting to be that of KENT A. BROWN was affixed thereto by me on June 17, 1974, immedieately following the signing of said document by FRANK CASTRO, JR.

11. On June 17, 1974, I personally delivered to FRANK CASTRO, JR., a bank draft bearing Number 257209 in the sum of One Thousand Two Hundred Forty Dollars ($1,240.00) made payable to FRANK CASTRO, JR.

12. The figure of $1,200.00 inserted in the enclosed rectangle in the middle of Exhibit "A" and in the concluding paragraph is in error and was inadvertently entered. The amount of the settlement and the amount in fact paid was $1,240.00 and this figure is properly insertable in lieu of $1,200.00 where indicated.

FURTHER AFFIANT SAYETH NOT.

/s/ KENT A. BROWN

I hereby certify that I am a Notary Public in and for the County of Cook and State of Illinois and that on the 7th day of March, 1978, the individual personally known to me to be KENT A. BROWN appeared before me and having been duly sworn acknowledged upon his oath the truth of the matters set forth in the foregoing Affidavit and subscribed his name thereto.

My Commission Expires October 24, 1979

/s/ William F. Stroud
NOTARY PUBLIC

(SEAL)

EXHIBIT "A"

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

FILE No. 74-323 Castro Illinois Division

RELEASE OF ALL CLAIMS

FOR THE SOLE AND ONLY CONSIDERATION OF One Thousand Two Hundred Forty And No/100 Dollars ($1,240.00—), the receipt of which is hereby acknowledged, I hereby release and forever discharge Chicago, Rock Island and Pacific Railroad Company and all other persons, firms and corporations from any and all liability on account of any and all injuries (BOTH KNOWN AND UNKNOWN), damage to property, and all other loss or damage sustained by me at or near Chicago, Illinois on or about _____ 19 _____, Wherein during all my employment with Rock Island to date.

THIS SPACE TO BE FILLED OUT IN EMPLOYEE SETTLEMENTS ONLY

The following apportionment is agreed upon:

To Time Lost $ None

To Other Factors $ _____

Tax $ _____

Deduction for Sickness

Benefits Paid $ None

Draft Amount $ —1,200.00—

Period Covered.....SSA No. 338-16-5483

I know that $1,200.00 is all I will receive for all my claims, no other representations or promises having been made, and that said sum is paid solely in compromise of said claims, liability for which is denied. I have read and understand this release. yes I have read and understand this release

Signed and Sealed this 17th day of June, 1974

Frank (illegible) (Seal)
_____ (Seal)

WITNESSES TO SIGNATURE:

Kent A. Brown

Paid by draft No. 257209 drawn by Kent A. Brown, Adjuster, Chicago

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EXHIBIT F

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

AT LAW NO. 77 L 397

Frank Castro, Jr.,
Plaintiff,

vs.

Chicago, Rock Island And Pacific Railroad Company,
a corporation,
Defendant.

AFFIDAVIT

STATE OF ILLINOIS }
} ss:
COUNTY OF COOK }

I, PATRICK J. LLOYD, having been duly sworn and being of legal age, depose and state upon my oath that if called as a witness in the above-entitled cause, I could completely testify to the following matters of my own personal knowledge:

1. On and before May 20, 1975, I was employed by the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY as a general claims agent.

2. On and before May 20, 1975, I was personally acquainted with FRANK CASTRO, JR., who is the Plaintiff in this case.

3. On and before May 20, 1975, FRANK CASTRO, JR., was employed by the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

4. On and before May 20, 1975, said FRANK CASTRO, JR., alleged to have suffered physical injuries as a result of one or more accidents occurring prior to May 20, 1975, during the course of his employment by the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and said FRANK CASTRO, JR., specifically alleged to have suffered injury from a work accident occurring on or about September 26, 1974.

5. On and immediately prior to May 20, 1975, FRANK CASTRO, JR., was actively working and performing manual labor in the course of his employment with the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

6. On May 20, 1975, a conference was held in my business office between myself and FRANK CASTRO, JR., at which time and place FRANK CASTRO, JR., agreed to execute a Release of All Claims in favor of the CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY for all injuries which he may have sustained at any time prior to May 20, 1975, in consideration of the payment to FRANK CASTRO, JR., of the sum of Six Thousand Seven Hundred Dollars ($6,700.00).

7. On May 20, 1975, FRANK CASTRO, JR., was of legal age.

8. On May 20, 1975, in my immediate presence, FRANK CASTRO, JR., signed a document entitled Release of All Claims. The document attached hereto as Exhibit "A" is a true, accurate and complete copy of said Release of All Claims signed by FRANK CASTRO, JR., in my presence on May 20, 1975.

9. The signature on Exhibit "A" attached hereto purporting to be that of FRANK CASTRO, JR., was affixed thereto by the person personally known to me to be FRANK CASTRO, JR., in my presence on May 20, 1975.

10. The signature on Exhibit "A" attached hereto purporting to be that of P. J. LLOYD was affixed thereto by me on May 20, 1975, immediately following the signing of said document by FRANK CASTRO, JR.

11. On May 20, 1975, I personally delivered to FRANK CASTRO, JR., a bank draft bearing Number 258306 in the sum of Four Thousand Five Hundred Eighty and 90/100 Dollars ($4,580.90) made payable to FRANK CASTRO, JR. The foregoing stated figure represented the balance owing to FRANK CASTRO, JR., on the settlement amount of Six Thousand Seven Hundred Dollars ($6,700.00) after deducting advancements and RRB benefits and Benefit Trust Life supplement benefits previously paid.

FURTHER AFFIANT SAYETH NOT.

/s/ PATRICK J. LLOYD

I hereby certify that I am a Notary Public in and for the County of Cook and State of Illinois and that on the 7th day of March, 1978, the individual personally known to be to be PATRICK J. LLOYD appeared before me and having been

duly sworn acknowledged upon his oath the truth of the matters set forth in the foregoing Affidavit and subscribed his name thereto.

/s/ Marie J Vela
NOTARY PUBLIC

My Commission Expires Nov. 24, 1981

(SEAL)

EXHIBIT "A"

Chicago, Rock Island And Pacific Railroad Company

File No. 74-1984 Illinois Division

RELEASE OF ALL CLAIMS

For the sole and only consideration of Six Thousand Seven Hundred and no/one hundredths Dollars ($6,700.00**), the receipt of which is hereby acknowledged, I hereby release and forever discharge Chicago, Rock Island and Pacific Railroad Company and all other persons, firms and corporations from any and all liability on account of any and all injuries (both known and unknown), damage to property, and all other loss or damage sustained by me at or near _____ on or about _____ 19 ____, during all my employment with the Chicago, Rock Island and Pacific Railroad Company to date.

THIS SPACE TO BE FILLED OUT IN EMPLOYEE SETTLEMENTS ONLY

The following apportionment is agreed upon:
Advancements—$1,300.00

To Time Lost $_____

To Other Factors $6,700.00**

Tax $_____

Deduction for Sickness

RRB Benefits Paid $546,10**

Draft Amount $4,580.90**

Period Covered .....SSA No.

Benefit Trust Life Supplemental benefits paid $273.00

I know that $6,700.00** is all I will receive for all my claims, no other representations or promises having been made, and that said sum is paid solely in compromise of said claims, liability for which is denied.

Signed and Sealed this 20th day of May 1975
Frank Castro Jr. (Seal)
(Seal)

Witness to Signature:
P. J. Lloyd

Paid by draft No. 258306 drawn by L. G. Algozino

APPENDIX C

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT
PEORIA COUNTY, ILLINOIS

NO. 77-L-397

Frank Castro, Jr.,
Plaintiff,

vs.

Chicago, Rock Island and Pacific Railroad Company,
a Corporation,
Defendant.

AFFIDAVIT

STATE OF ILLINOIS
SS.
COUNTY OF COOK

I, FRANK CASTRO, JR., being first duly sworn, upon my oath depose and say:

1. I am the plaintiff in the above-entitled cause.

2. My case arises out of several accidents which occurred on February 20, 1974, September 26, 1974 and June 20, 21 and 22, 1975.

3. That I did execute a document entitled "Release" on or about June 17, 1974, wherein I was paid ONE THOUSAND, TWO HUNDRED FORTY DOLLARS ($1,240.00). My understanding, when I executed this document, was that I had to execute it to receive my lost time for time off due to the accidents.

4. On May 20, 1975, I executed a document, wherein I received the total amount of SIX THOUSAND, SEVEN HUNDRED DOLLARS ($6,700.00), minus various benefits which had been advanced. It was my understanding, when I executed this document, that it was solely for the purpose of receiving lost wages for time off due to accidents on the Railroad.

5. At no time prior to June 17, 1974 and May 20, 1975, did I have any knowledge of the fact that I had a condition of the back, which required an operation. I had a low-back operation due to the accidents on June 10, 1975.

DATED this 3rd day of March, 1979.

/s/ Frank Castro, Jr.

I, the undersigned, a Notary Public in and for said County and State aforesaid, DO HEREBY CERTIFY that FRANK CASTRO, JR, personnaly known to me to be the same person whose name is subscribed to the foregoing instrument, as having executed the same, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 3rd day of March, 1979.

/s/ David M. Day
Notary Public

My Commission Expires:
Notary Public State of Illinois
My Commission Expires Dec. 27, 1980
Issued Thru Illinois Notary Assoc.

APPENDIX D

STATE OF ILLINOIS

Appellate Court Third District
Ottawa

No. 79-384

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord one thousand nine hundred and seventy-nine, within and for the Third District of Illinois:

Present-

HONORABLE ALLAN L. STOUDER, Presiding Justice X

HONORABLE JAY J. ALLOY, Justice

HONORABLE RICHARD STENGEL, Justice X

HONORABLE TOBIAS BARRY, Justice

HONORABLE ALBERT SCOTT, Justice X

JOSEPH FENNESSEY, Clerk

BE IT REMEMBERED, that afterwards on January 24, 1980 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Case No. 79-384

In The
APPELLATE COURT OF ILLINOIS
Third District

A.D. 1980

Frank Castro, Jr.,
Plaintiff-Appellant,

vs.

Chicago, Rock Island and Pacific Railroad Company,
a Corporation,
Defendant-Apellee.

Appeal from the Circuit Court of the Tenth Judicial Circuit,
Peoria County, Illinois.

Honorable Albert Pucci, Stephen J. Covey Presiding Judge.

PRESIDING Mr. JUSTICE STOUDER delivered the opinion of the court:

This is an appeal from a judgment of the Circuit Court of Peoria County against the plaintiff-appellant, Frank Castro, and in favor of defendant-appellee, Chicago, Rock Island and Pacific Railroad Company. Plaintiff brought this action against defendant, his employer, pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. secs. 51-60. The complaint contained three counts, each count alleging a different accident. Defendants answered count III of the complaint and filed a motion to dismiss counts I and II, alleging that plaintiff had signed a release in reference to the accidents in counts I and II, and attaching copies of the purported releases to the motion. Defendant's motion to dismiss was predicated upon Illinois Revised Statutes, ch. 110, par. 48(1)(f). It is disputed as to whether or not there were affidavits filed in support of the motion, as required by the statute. Plaintiff filed no affidavits in opposition. The court granted defendant's motion to dismiss counts I and II. Plaintiff filed a motion to reconsider the judge's ruling, which was heard and denied. Plaintiff then filed another motion to reconsider the previous decisions. To this motion, plaintiff attached an affidavit in opposition. This motion was heard and

denied. Plaintiff then voluntarily dismissed count III of his complaint and filed this appeal in reference to the dismissal of counts I and II. We reverse.

The central issue on appeal is whether or not Illinois Revised Statutes, ch. 110, par. 48 is applicable to a FELA action. This statute reads in pertinent part:

> "(1) Defendant may within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit: ***
>
> (f) That the claim or demand set forth in the plaintiff's pleading has been released ***
>
> (3) If upon the hearing of the motion, the opposite party presents affidavits or other proof *** establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuinely disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties or may deny the motion *** and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time."

Plaintiff argues that the FELA gives plaintiffs under the Act the right to a jury trial and that the language in paragraph 3 of the statute, "If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties", violates this right in that it permits a judge to determine controverted questions of fact. Therefore, plaintiff argues, sec. 48 must be inapplicable in a FELA action. We disagree.

It is a well established rule that in a conflict of laws case the law of the forum governs matters of procedure. A plaintiff to whom a right of action is given by the FELA has a right to bring his suit in either the federal or the state court. If he elects to bring it in the state court, the procedure is regulated by state law. *Taylor* v. *Southern Ry.* (1932), 350 Ill. 139, 182 N.E. 805. However, the state's procedure may not be used to defeat a substantive right. We believe that par. 48 of the Civil Practice Act cannot be so used.

The plaintiff is entitled to a jury trial under the FELA if there are material facts in controversy. (In the absence of a genuine issue of a material fact, summary judgment may be proper in a FELA case. *See Blaylock* v. *Toledo, P. & W.R.R.* (1976), 43 Ill. App. 3d 35, 356 N.E.2d 639.) Section 48 does not deny plaintiff this right. The statute specifically states that if there is a controversy as to the facts involved in a section 48 motion, then the judge must deny it if the party is entitled to a jury trial and a jury demand has been filed in apt time. Therefore, section 48 cannot be used to deny a party a jury trial, is not violative of federal law, and may properly be used in a FELA action.

Having held that sec. 48 is applicable, we now determine if the trial court applied it properly. There is a dispute as to whether or not defendant filed affidavits showing the releases with his motion to dismiss. However, in responding to defendant's motion to dismiss and in subsequent motions for rehearing, plaintiff did not raise the issue of whether affidavits were filed with the motion. The rule is that if an issue is not timely raised in the trial court, it is deemed waived. *Smith* v. *Ashley* (1975), 29 Ill. App. 3d 932, 332 N.E.2d 32. Since plaintiff did not raise the issue in the trial court, we believe that he waived it and it cannot now be presented on appeal.

At the time that the trial court ruled on the motion to dismiss, plaintiff had not presented any affidavits or proof obviating the releases. Therefore, the trial court did not err in granting defen-

dant's motion to dismiss. In plaintiff's first motion for a rehearing, there was still no affidavit or proof obviating the releases. Therefore, we believe there was no error in denying plaintiff's first motion for a rehearing.

Plaintiff's second motion for rehearing admitted the releases and contained counter-affidavits which raised controverted questions of fact. We believe that it was an abuse of discretion for the trial judge to deny this motion. In *Dice* v. *Akron C. & Y. R.R.* (1952), 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398, the Supreme Court emphatically stated that a jury trial is an integral part of the FELA. In *Dice,* an action was brought under the FELA in Ohio and defendant pleaded a release as a defense. Under Ohio law, the plaintiff had to seek equitable relief from the release before enforcing the claim which the release purported to bar. On that ground the trial judge reversed a jury verdict in favor of the plaintiff, saying that, in equity, he was the trier of fact with regard to the validity of the release and that he felt the release was valid. The Supreme Court reversed, holding that the jury was the proper trier of fact. The Court stated that trial by jury is "part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Id* at 363 (quoting from *Bailey* v. *Central Vermont R.R.* (1943), 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444). Therefore, the Court continued, the jury must decide the validity of the release because "to deprive railroad workers of the benefit of a jury trial where there is evidence of negligence 'is to take away a goodly portion of the relief which Congress has afforded them' ".

In the instant case, plaintiff has filed a counter-affidavit which adequately controverts the releases and places their validity in dispute. Plaintiff alleges that he signed the releases solely for the purpose of receiving lost wages for time off due to the accidents. This is adequate to support an argument that there was no consideration for the release. Lack of consideration is a sufficient issue to present a jury question under the FELA. *Maynard* v. *Durham & So. Ry.* (1961), 365 U.S. 160, 81

S.Ct. 561, 5 L.Ed. 2d 486. Plaintiff also swears in his affidavit that he had no knowledge of the fact that he had a back condition requiring surgery. We believe that this is adequate to create a genuine issue of mutual mistake of fact, which is a jury question under the FELA. *Taylor* v. *Chesapeake & O. Ry.* (4th Cir. 1975), 518 F.2d 536.

While plaintiff's affidavits might not be as thorough and meticulous as an affidavit required for a summary judgment motion, we believe that it is sufficient to establish the existence of controverted facts in a sec. 48 motion. This and the strong federal policy in favor of a jury trial in FELA actions where there is an issue of fact compel us to hold that the trial court's denial of the second motion for rehearing was an abuse of discretion and should be reversed.

After the appellant had filed his brief indicating the record did not include any affidavits filed by appellee pursuant to section 48, the appellee moved for leave to supplement the record by having affidavits included in the record which it alleged were, in fact, filed in the trial court and, for some unknown reason, not included in the record. The appellant objected to such motion and it was taken with the case for decision. In the view we have taken of this case, whether such affidavits were or were not filed is immaterial and consequently the motion is denied.

For the abovementioned reasons, the judgment of the Circuit Court of Peoria County is reversed and remanded.

Reversed and remanded.

STENGEL and SCOTT, JJ., concur.

APPENDIX E

OPINION
SUPREME COURT
OF ILLINOIS

State of Illinois } ss.
Supreme Court }

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood — Justice Daniel P. Ward

Justice Howard C. Ryan — Justice William G. Clark

Justice Thomas J. Moran — Justice Thomas E. Kluczynski

Tyrone C. Fahner, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that afterwards, to-wit, on the 1st day of December, 1980 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Frank Castro, Jr.,
Appellee

vs.

Chicago, Rock Island and Pacific
Railroad Company, a Corp.,
Appellant

No. 53230

Appeal from
Appellate Court
Third District

Docket No. 53230—Agenda 48—September 1980.

FRANK CASTRO, JR., Appellee, v. CHICAGO, ROCK ISLAND, AND PACIFIC RAILROAD COMPANY, Appellant.

MR. JUSTICE MORAN delivered the opinion of the court:

The plaintiff, Frank Castro, Jr., filed a three-count complaint in the circuit court of Peoria County against defendant, Chicago, Rock Island and Pacific Railroad Company, under the Federal Employers' Liability Act (FELA) (45 U.S.C. sec. 51 *et seq.* (1976)). The trial court granted defendant's motion to dismiss counts I and II on the basis of release. Plaintiff's motions for rehearing were denied. The appellate court reversed, finding that the trial court abused its discretion by failing to grant plaintiff's second motion for rehearing. (81 Ill. App. 3d 233.) We granted defendant's petition for leave to appeal.

On February 2, 1977, plaintiff filed his three-count complaint and jury demand. One year later, defendant moved, under section 48(f) of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 48(f)), to dismiss counts I and II on the basis that the plaintiff had executed releases, thereby relieving defendant of liability. Plaintiff made a motion to strike defendant's motion, claiming that section 48 is not applicable in an FELA action as it defeats plaintiff's right to trial by jury. Defendant's motion to dismiss counts I and II was granted. On May 1, 1978, plaintiff filed a motion to reconsider (unauthorized by statute or rule), realleging the same ground previously stated. This motion was heard and denied. On March 13, 1979, almost one year after the

original motion to dismiss was granted, plaintiff filed a second motion to reconsider. To this motion was attached the affidavit of plaintiff in which he stated:

> "It was my understanding, when I executed [these documents], that it was solely for the purpose of receiving lost wages for time off due to accidents on the Railroad.
>
> At no time prior [to the dates of the releases], did I have any knowledge of the fact that I had a condition of the back, which required an operation.

Defendant then moved to strike plaintiff's affidavit claiming that it was insufficient under Supreme Court Rule 191 (73 Ill. 2d R. 191) as it sets forth only conclusions unsupported by allegations of specific facts. Plaintiff's second motion for reconsideration was also denied. Thereafter, plaintiff voluntarily dismissed count III and appealed the dismissal of counts I and II. The appellate court found that plaintiff's affidavit was "sufficient to establish the existence of controverted facts," thereby defeating defendant's motion to dismiss. 81 Ill. App. 3d 233, 238.

Defendant asserts two arguments in support of his claim that the trial court appropriately denied plaintiff's second motion for reconsideration: (1) the filing of the motion and supporting affidavit were untimely in that they were filed almost one year after the original motion was heard; and (2) the affidavit in support of plaintiff's motion was insufficient under Supreme Court Rule 191 to raise any material and genuine question of fact as it contained only conclusions unsupported by allegations of specific facts.

Plaintiff contends that defendant's motion to dismiss was improper in the first instance because a section 48 motion denies plaintiff his federally protected right to trial by jury and, thus, cannot be used in an FELA action. Plaintiff also argues that even if section 48 is appropriate in an FELA case, defendant's

motion was, nonetheless, insufficient at law since it failed to meet the requirement that the motion be supported by affidavit.

We first address plaintiff's issue of whether a motion under section 48 may be used in an FELA case. He relies on a portion of paragraph 3 of section 48 in support of his claim that the statute infringes on his right to trial by jury by allowing the court to decide a controverted question of fact. That portion states:

> "If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties ***." Ill. Rev. Stat. 1977, ch. 110, par. 48(3).

While in an FELA action, the procedural rules applied are those of the forum, a Federal substantive right cannot be lessened or destroyed by a State rule of procedure. (*Brant* v. *Chicago & Alton R.R. Co.* (1920), 294 Ill. 606, 616.) The right to trial by jury is an integral part of the rights afforded to workers under the Federal Employers' Liability Act. (*Bailey* v. *Central Vermont Ry., Inc.* (1943), 319 U.S. 350, 354, 87 L. Ed. 1444, 1448, 63 S. Ct. 1062, 1064.) We do not, however, believe that a section 48 motion infringes upon plaintiff's right to trial by jury in an FELA action. Paragraph 3 of section 48 further provides that the motion shall be denied if a "material and genuine disputed question of fact is raised *** if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time." (Ill. Rev. Stat. 1977, ch. 110, par. 48(3).) Thus, in all civil cases, including those brought under FELA, the court cannot decide material and genuine disputed questions of fact when a jury demand has been appropriately filed. Contrary to the plaintiff's argument, section 48 protects his right to trial by jury.

The plaintiff also argues that the defendant's motion under section 48 is insufficient at law because defendant failed to at-

tach affidavits in support of the motion as required under section 48(1) of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 48(1)). Such affidavits were not part of the original record certified by the trial court. However, defendant filed a certified supplemental record in the appellate court containing copies of the affidavits in support of its motion bearing the circuit court stamp showing that they had been filed a week before the motion was heard. This sufficiently establishes that the defendant did, in fact, file supporting affidavits in support of its motion in compliance with section 48(1). We find no merit to either contention raised by plaintiff.

Defendant argues that the trial court appropriately denied the plaintiff's second motion for reconsideration because it was made one year after the hearing on the original motion.

Under Supreme Court Rule 304(a) (73 Ill. 2d R. 304(a)), a judgment which adjudicates fewer than all the claims presented is "not enforceable or appealable and is *subject to revision at any time* before the entry of a judgment adjudicating all the claims." (Emphasis added.) Since count III of plaintiff's action was pending at the time he filed his second motion to reconsider, the court had jurisdiction under Rule 304(a) to revise its order dismissing counts I and II. Although the appropriate procedure would have been for plaintiff to file his affidavit prior to a hearing on the motion to dismiss, the court, nevertheless, retained jurisdiction to entertain the motion. We do not, however, approve of plaintiff's dilatory practice.

Defendant also argues that the affidavit of plaintiff filed in support of the motion to reconsider was insufficient at law as it contained conclusions unsupported by allegations of specific facts.

Supreme Court Rule 191(a) (73 Ill. 2d R. 191(a)) requires that affidavits in support of or in opposition to motions for involuntary dismissal under section 48 of the Civil Practice Act "shall not consist of conclusions but of facts admissible in evidence;

and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." The affidavit of plaintiff stated that it was his understanding that the releases had to be executed in order for him to receive his back wages. He also stated that, at the time each release was signed, he was unaware of the extent of his injuries. Under Federal law, a release may be attacked on the basis of fraud or lack of consideration. (*Maynard* v. *Durham & Southern Ry. Co.* (1961), 365 U.S. 160, 161, 5 L. Ed. 2d 486, 487-88, 81 S. Ct. 561, 562; *Dice* v. *Akron, Canton & Youngstown R.R. Co.* (1951), 342 U.S. 359, 361, 96 L. Ed. 398, 403, 72 S. Ct. 312, 314.) Plaintiff's affidavit presents no facts which he could competently testify to at trial. His "understanding" as to why he executed the releases is only a conclusion. That he was unaware of the extent of his injuries when he received the settlement award does not void the releases. It is only where the affidavit sets forth facts establishing fraud, lack of consideration or mutual mistake that the plaintiff would be entitled to overcome defendant's motion to dismiss under section 48(f). (*See Blaylock* v. *Toledo, Peoria & Western R.R. Co.* (1976), 43 Ill. App. 3d 35, 38.) We therefore find that the trial court appropriately refused to grant plaintiff's second motion for reconsideration.

For the reasons stated, we reverse the judgment of the appellate court and affirm the judgment of the circuit court.

Appellate court reversed;
circuit court affirmed.

APPENDIX F

UNITED STATES OF AMERICA

State of Illinois

ss.

Supreme Court

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one thousand nine hundred and eighty-one, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood — Justice Daniel P. Ward

Justice Howard C. Ryan — Justice William G. Clark

Justice Thomas J. Moran — Justice Seymour Simon

Tyrone C. Fahner, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that, to-wit: on the 29th day of January, A.D. 1981, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Frank Castro, Jr.,
Appellee

vs.

Chicago, Rock Island and Pacific
Railroad Company, a Corporation,
Appellant

No. 53230

Appeal from
Appellate Court
Third District
79-384
77 L 3971

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 16th day of March, A.D. 1981.

Clell L. Woods Clerk,
Supreme Court of the State of Illinois.

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK CASTRO, JR.,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Mr. Wayne L. Hanold, Counsel of Record
Mr. David R. Aplington
WESTERVELT, JOHNSON, NICOLL & KELLER
1400 First National Bank Building
Peoria, Illinois 61602
(309) 671-3550

Mr. O. L. Houts, General Solicitor
Chicago, Rock Island and Pacific Railroad Company
332 S. Michigan Avenue
Chicago, Illinois 60604
Of Counsel
Attorneys for Respondent

Mr. John T. Pierce, Jr.
Paul L. Pratt, P.C.
Route 111 at Airline Drive
P.O. Box 179
East Alton, Illinois 62024
(618) 259-8011
Attorneys for Petitioner

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

QUESTION PRESENTED FOR REVIEW

In a Federal Employers' Liability Act case, 45 U.S.C., § 51, et seq., was the Supreme Court of Illinois correct in affirming the trial court's decision to dismiss Petitioner's claims, because no genuine and material question of fact existed.

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No. 80-1815

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRANK CASTRO, JR.,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Chicago, Rock Island and Pacific Railroad Company, Respondent, submits this brief in opposition to the Petition for Writ of Certiorari filed by Frank Castro, Jr., Petitioner.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari omits certain facts crucial to the decisions below. Those facts are set forth herein, and are fully supported by the opinion of the Illinois Supreme Court below. (Petitioner's Appendix, A-31 to A-32, referred to herein as "Appendix.") This cause arose out of Respondent Railroad's motion under Section 48 of the Illinois Civil Practice Act.*

*Section 48 is set forth at page 3 of the Petition.

Section 48 permits the defendant to move to dismiss the complaint by presenting affidavits raising factual matters. In its opinion below, the Illinois Supreme Court stated that a section 48 motion:

> shall be denied if a "material and genuine disputed question of fact is raised * * * if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time." (Ill. Rev. Stat. 1977, ch. 110, par. 48(3).) Thus, in all civil cases, including those brought under FELA, the court cannot decide material and genuine disputed questions of fact when a jury demand has been appropriately filed. Contrary to the plaintiff's argument, section 48 protects his right to trial by jury.

(Appendix, A-33.) In the instant case, Respondent filed affidavits setting forth Petitioner's release of his claim. (Appendix, A-10 to A-23.) Section 48 permits the opposing party to file affidavits in opposition to the motion. (Section 48(3).) The Illinois procedure under Section 48 is not unlike the procedure contemplated by Rule 12(b) and 12(c) of the Federal Rules of Civil Procedure. Rule 12 permits the court to treat a motion raising factual matters as a Rule 56 motion for summary judgment.

In response to Respondent's section 48 motion, Petitioner filed a Motion to Strike in which he argued that section 48 is not applicable in a case arising under the Federal Employers' Liability Act. (A-31 to A-32.) No affidavits were filed by the Petitioner in opposition to the motion. The court granted Respondent's Motion and dismissed Counts I and II of Petitioner's complaint. Thereafter, in May of 1978, Petitioner filed a Motion for a rehearing of the court's order dismissing Counts I and II. The motion requested that the motion be reheard or in the alternative that Petitioner be permitted to dismiss Count III of his Complaint and file a notice of appeal. Petitioner did not file affidavits with his Motion for Rehearing, and the court denied the Motion.

On March 13, 1979, approximately one full year after the trial court's original ruling on Respondent's motion, and approximately ten months after the court's denial of the Motion for Rehearing, Petitioner filed a second Motion to Reconsider the trial court's ruling. In support of that motion, Petitioner attached his affidavit, in which he admitted that he executed releases of his claims, as alleged by Respondent's affidavits. Petitioner stated affirmatively, however, that it was his understanding that the releases were solely for the purposes of receiving lost wages. Respondent filed a motion to strike Petitioner's affidavit because the affidavit set forth only conclusions unsupported by allegations of specific facts; because the conclusions in the affidavit did not support a mutual mistake of fact, and a unilateral mistake of fact is insufficient to avoid a release; and because the trial court had ruled on the issue on two previous occasions. The Motion to Reconsider was denied by the trial court and an appeal followed.

SUMMARY OF ARGUMENT

Petitioner failed to comply with state procedural requirements, and the state trial court properly dismissed his claim. The decisions below were consistent with well established federal case law.

REASONS FOR DENYING THE WRIT

Although federal substantive law applies in an FELA case, black letter conflicts of law principles hold that the forum court applies its own rules of procedure. *Chesapeake and Ohio Railway Company v. DeAtley*, 241 U.S. 310, 316-17 (1916). Thus, in the trial court below, Illinois procedural law controlled. Both federal courts and Illinois courts have held that the procedural rules of the state court govern in FELA actions brought in a state court. *Id.* at 316-17; *State of Missouri ex rel. Southern Railway Company v. Mayfield*, 340 U.S. 1, 3-5 (1950); *Taylor v. The Southern Railway Company*, 350 Ill. 139, 145-46, 182 N.E.

805 (1932). The Supreme Court of Illinois had previously decided the issue in *Brant v. The Chicago & Alton Railroad Company*, 294 Ill. 606, 128 N.E. 732 (1920), citing this Court. In *Brant*, the defendant railroad failed to follow a state procedural rule, and the court upheld a judgment against defendant. The *Brant* court held, citing this Court:

> Under the practice in this state Plaintiff in error is bound by that finding, and we think that under the ruling of the Supreme Court of the United States in Atlantic Coast Line Railroad Co. v. Mims, 242 U.S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476, it is also bound, under the rules of that court, by these special findings. That court recognizes the doctrine that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice; yet it holds that such a right or defense must be asserted at a time and in such manner in the state court as will entitle the defendant to a consideration of such right or defense by the state court under its established system of practice and pleading.

128 N.E. at 736, 294 Ill. at 616.

In *Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 535, this Court had specifically held that a federal right or claim "must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice." The *Mims* holding and rationale are directly on point in the present case. Contrary to the rulings of this Court and the Illinois courts, Petitioner did not follow Illinois procedural rules. He had the opportunity to submit affidavits in opposition to Respondent's motion, but failed to do so. Thus, no material and genuine disputed question of fact was raised at the hearing on Respondent's motion to dismiss. In such a case, the court's decision to dismiss the Complaint and enter judgment against Petitioner was proper.

The Illinois court's decision below parallels the federal procedure. The federal courts do not always require submis-

sion of an FELA case to a jury, but rather, permit decisions by the trial court as a matter of law. *Amos v. The Pullman Co.*, 236 F. 2d 666 (D.C. Cir. 1956), *cert. den.* 352 U.S. 847, is on point, and refutes Petitioner's argument. In *Amos* the defendant moved for summary judgment on the basis of an "uncontroverted affidavit" of an employee of defendant. Thus, the facts and procedure were closely analagous to the instant case. On appeal, the appellate court stated:

> The District Court granted appellee's motion for summary judgment on its view that the uncontroverted affidavit of appellee's vice-president established that appellee was not a "common carrier by railroad". On this appeal appellant insists that whether or not appellee is subject to the Federal Employers' Liability Act remains a genuine issue of material fact and must therefore be tried. We think the District Court was clearly right.

Thus, the *Amos* court permitted a summary judgment in favor of defendant where defendant's affidavits established that no genuine issue of material fact existed. See also *Dillard v. Thompson*, 5 F.R.D. 26 (W.D. La. 1945); *Rohner v. Union Pacific Railroad Company*, 225 F. 2d 272 (10th Cir. 1955). In *Rohner*, plaintiff's case was dismissed on the face of the pleadings, just as Petitioner's claim was dismissed herein.

The procedure in the instant case was consistent with federal decisions. Moreover, neither in this Court nor below has Petitioner cited any case prohibiting the procedure. Courts in other states have approved the same procedure. *See, e.g., Pena v. Southern Pacific Transportation Co.*, 555 S.W. 2d 184 (Tex. App. 1977). Because Petitioner elected not to file affidavits in opposition to Respondent's motion, no genuine and material disputed issue of fact existed when the trial court dismissed Counts I and II. Moreover, the affidavit eventually filed by Petitioner was not only untimely, but insufficient. (Opinion of the Supreme Court of Illinois, A-34 to A-35.) Therefore, the trial court properly dismissed Counts I and II, and no federal

question is presented before this Court. The decision below is consistent with established federal precedent. Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

CONCLUSION

Wherefore, for all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Mr. Wayne L. Hanold, Counsel of Record
Mr. David R. Aplington
WESTERVELT, JOHNSON, NICOLL & KELLER
1400 First National Bank Building
Peoria, Illinois 61602
(309) 671-3550

Mr. O. L. Houts, General Solicitor
Chicago, Rock Island and Pacific Railroad Company
332 S. Michigan Avenue
Chicago, Illinois 60604
Of Counsel

Attorneys for Respondent